

## ADMINISTRATIVE LAW

Contribution to the course from the perspective of comparison of laws

concerning § 4 and § 3 VI of the course contribution**Case 1**

(facts of the case)

After finishing their studies at Universitas Gadjah Mada, mbak A and mbak B, two devout muslima from Java, continue their studies in an international postgraduate study program in a city in the Land L in the southeast of Germany. Since they have only focused on the quality of the study program when preparing their stay in Germany, they are not aware that the Land L is known for its problems with right-wing extremism, xenophobia and islamophobia - and the ignoring or playing down of it by the state authorities. One evening, when they are enjoying a walk in the beautiful pedestrian area in the city centre, three local men stop them, insult them and demand them to take off their hijab [headscarf], threatening to beat them if they do not. When mbak A and mbak B refuse to take off their hijab for religious reasons, the local men grab them at their backside and try to touch their breasts and to tear their hijabs down. Two policemen patrolling nearby have noticed that. They approach but do not talk with mbak A and mbak B but only with the three local men. Finally, they order mbak A and mbak B to take off their hijab. They explain that mbak A and mbak B have the right to wear the hijab in Germany but that the police needs to take measures to protect the public security and order ["öffentliche Sicherheit und Ordnung"] if the wearing of the hijab triggers anger among the locals which may result in public disorder.

You are pursueing postgraduate studies in German public law in another German university town where this problem does not exist. When you meet mbak A and mbak B at the next weekend, they ask you if the order they received from the policemen was legal and if they can take legal action against it before the administrative court. What will be your (correct) answer?

**Legal provisions relevant for the case:**

Excerpt from the Basic Law for the Federal Republic of Germany [= BL] (German Constitution)

Art. 4(1,2) [freedom of religion]

- (1) Freedom of faith, of conscience and freedom to profess a religious or philosophical creed shall be inviolable.
- (2) The undisturbed practice of religion is guaranteed.

Art. 19(4) [guarantee of recourse to the courts against rights violations]

- (4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. ...

Excerpt from the Administrative Procedure Act [=APA]

Sect. 28: Hearing of participants

- (1) Before an administrative act affecting the rights of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision.
- (2) This hearing may be omitted when not required by the circumstances of an individual case, in particular when
  1. an immediate decision appears necessary because of imminent danger or in the public interest ...
- (3) A hearing shall not be granted if it conflicts with imperative public interest.

Excerpt from the Police Act of the Land L [= LPolA]

Sect. 2: Tasks of the Police

The Police has the task to avert dangers for the public security or order (averting of dangers). The Police ... ensures the unhindered exercise of fundamental rights. ... The Police only intervenes, if the averting of the danger by the [competent authorities] appears impossible or not possible in time.

Sect. 12(1): General powers

The Police may adopt the necessary measures to avert a danger for the public security or order, unless the powers are specifically regulated.

Sect. 6(1): Responsibility for one's own behaviour

If a person causes a danger [for public security or order], the measures must be directed against this person.

Excerpt from the Code of Administrative Court Procedure [= CACP]

Sect. 40(1): [Recourse to the Administrative Courts]

(1) Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute. ...

Sect. 42: [Actions for annulment and for the issue of an administrative act]

(1) The annulment of an administrative act (action for annulment), as well as sentencing to issue a rejected or omitted administrative act (action for the issue of an administrative act) can be requested by means of an action.

(2) Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his rights have been violated by the administrative act or its refusal or omission.

Sect. 113(1) phrase 4: [establishment of the unlawfulness of an administrative act settled during the court proceedings] (applied analogously)

(1) ... If the administrative act has been settled previously by withdrawal or otherwise, the court shall declare on request by judgment that the administrative act was unlawful if the plaintiff has a justified interest in this finding.